WHY THE COMMISSION SHOULD NOT ADOPT A BROAD VIEW OF THE "PRIMARY VIDEO" CARRIAGE OBLIGATION

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INTRODUCTION AND SUMMARY

In January 2001, the Commission decided not to adopt an analog-digital double carriage requirement under Sections 614 and 615 of the 1992 Cable Act. In its decision, the Commission reached the tentative conclusion that, under the Supreme Court's decisions in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) *("Turner I")*, and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) *("Turner II")*, "a dual [analog-digital] carriage requirement appears to burden cable operators' First Amendment interests substantially more than is necessary to further the government's substantial interests" in enacting the statutory must-carry obligations.[1]

The Commission also determined, based on the record before it, that a cable operator's digital must-carry obligation would be limited to carriage of the "primary video" – which means only "a single video programming stream and other 'program-related' content." First Report and Order and FNPRM, 16 FCC Rcd at 2622. Thus, "if a digital broadcaster elects to divide its digital spectrum into several separate, independent and unrelated programming streams, only one of these streams is considered primary and entitled to mandatory carriage. The broadcaster must elect which programming stream is its primary video, and the cable operator is required to provide mandatory carriage to

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[1] First Report and Order and Further Notice of Proposed Rulemaking, In the Matter of Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues; Application of

only such designated stream." *Id*. The Commission reached this conclusion by "analyz[ing] the terms 'primary video' within their statutory context, consider[ing] the legislative history, and examin[ing] the technological developments at the time the must carry provisions were enacted." *Id*. at 2620.

The Commission was correct to reject an unlimited interpretation of "primary video" and to decide that a cable operator is not *required* to carry every programming stream a digital broadcaster might transmit. For example, even if a digital broadcaster were to use multiplexing technologies to carve *six* 1 MHz programming channels out of its 6 MHz of licensed spectrum, a cable operator should not be required to carry each of the independent programming streams. In the First Report and Order and FNPRM, the Commission properly focused on the text, structure, and legislative history of Sections 614 and 615 in order to conclude that only one of the programming streams should be deemed "primary" and entitled to mandatory carriage.

Constitutional considerations under both the First and Fifth Amendments are also important factors in militating against a broad view of the "primary video" carriage obligation. Forcing cable operators to carry multiple video streams of digital broadcasters would abridge the editorial freedom of cable operators, harm cable programmers, and invade the right of audiences to choose what they want to view – all without promoting any of the governmental interests contemplated by Congress in enacting the must-carry rules, or any of the interests approved by the Supreme Court in *Turner I* and *Turner II*. A multiple carriage requirement would also raise substantial issues under the Fifth Amendment's Takings Clause and under the separation of powers.

Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals, 16 FCC Rcd 2598, 2600 (2001) ("First Report and Order and FNPRM").

In short, a broad interpretation of "primary video" digital carriage obligations would raise serious constitutional questions and should therefore be avoided by the Commission. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 68 (1995); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concerning).

I. A Broad Interpretation of "Primary Video" Would Raise Serious First Amendment Questions.

A. A Broad View of "Primary Video" Would Abridge The Free Speech Rights of Cable Operators, Programmers, and Audiences.

Under an expansive interpretation of the "primary video" carriage obligation, cable operators would be forced to carry multiple channels of broadcast programming – regardless of whether there was consumer demand for the channels. For example, if a digital broadcaster carved *six* 1 MHz programming channels out of its 6 MHz of licensed spectrum, a broad view of "primary video" would require a cable operator to carry each of these separate programming streams. Thus, the constitutional burden on the cable operator would be multiplied: it would be forced to assign six or more cable programming channels to each local broadcast station. The net effect would be to prevent cable operators from selecting the most desirable programming on a wide swath of their channels.

Such a mandate would substantially abridge cable operators' editorial right to choose "what to say and what to leave unsaid." *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 11 (1986) (plurality opinion). The Supreme Court has expressly held that the editorial discretion of cable operators warrants First Amendment protection.

In *Turner I*, the Court opined that "[t]here can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment." 512 U.S. at 636 "Through 'original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,' cable programmers and operators 'see[k] to communicate messages on a wide variety of topics and in a wide variety of formats.'" *Id.* (quoting *Los Angeles v. Preferred Communications, Inc.,* 476 U.S. 488, 494 (1986)); *see also Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) ("Although programming decisions often involve the compilation of the speech of third parties, the decisions nonetheless constitute communicative acts."); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc*., 515 U.S. 557, 570 (1995) ("Cable operators, for example, are engaged in protected speech activities even when they only select programming originally produced by others.").

A broad interpretation of "primary video" would also invade the First Amendment rights of cable programmers. The Supreme Court has recognized that must-carry rules have the potential to harm cable programmers because they "render it more difficult for cable programmers to compete for carriage on the limited channels remaining." *Turner I*, 512 U.S. at 637. By guaranteeing carriage to some programmers (multicast broadcasters) while forcing others to compete for audiences, a broad view of "primary video" would impose burdens on cable programmers akin to those recognized by the Supreme Court in other cases involving preferential grants of access. *See, e.g.*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211 (1995) (where a law "prevent[s] the plaintiff from competing on an equal footing," "[t]he aggrieved party 'need not allege

that he would have obtained the benefit but for the barrier in order to establish standing'") (quoting *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 667 (1993)).

The enduring constitutional principle, set out by the Supreme Court in *Turner I* and *Turner II*, and in other decisions as well, does not depend on the precise number of channels that cable systems are technologically able to carry at any given moment in time. From a constitutional perspective, *any* interference with cable operators' editorial discretion creates a First Amendment issue. A multiple carriage requirement runs counter to the "general rule . . . that the speaker and its audience, not the government, assess the value of the information presented." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993). "Our political system and cultural life rest upon this ideal." *Turner I*, 512 U.S. at 641. In the realm of speech and expression, the First Amendment removes "governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity." *Cohen v. California*, 403 U.S. 15, 24 (1971).

Requiring carriage of multiple streams of video programming would constitute a restriction on speech, to be tested under First Amendment scrutiny, whatever the technological state of affairs may be. As Justice Breyer opined in *Turner II*, "the compulsory carriage that creates the 'guarantee' extracts a serious First Amendment price. It interferes with the protected interests of the cable operators to choose their own programming; it prevents displaced cable program providers from obtaining an audience; and it will sometimes prevent some cable viewers from watching what, in its absence,

would have been their preferred set of programs. This 'price' amounts to a 'suppression of speech.'" 520 U.S. at 226 (Breyer, J., concurring in part).

Some have argued for an expansive interpretation of "primary video" on the ground that there might be surplus cable channel capacity at the end of the digital transition. But such predictions are hazardous at best. Cable operators already have planned uses for cable's usable capacity, including the analog capacity currently occupied by broadcasters. These uses include digital video, high definition television, high speed Internet services, pay-per-view, video-on-demand and subscription video-on-demand, telephony, digital audio, and interactive television applications.[2] Accordingly, cable operators must leave some room for non-video programming services and for the development of new products and information technologies.

Past predictions of "surplus" channels have been proven false. Experience shows that the number of program services vying for carriage has always expanded faster than available channels. The number of national cable program networks rose from 79 networks in 1990 to 231 networks in 2000 – nearly a threefold increase over ten years. [3] Therefore, no one can have any confidence that cable systems will have excess capacity when the digital transition is completed.

Others have argued for an expansive interpretation of "primary video" on the ground that broadcasters already occupy 6 MHz of frequency on cable systems as a result of the analog must-carry rules. But this state of affairs is constitutionally irrelevant. The return (as part of the digital transition) of the 6 MHz currently occupied by analog must-carry signals does not entitle broadcasters to a *new* 6MHz of must-carry spectrum for

[2] *See* NCTA Comments on the Further Notice of Proposed Rulemaking in CS Docket Nos. 98-120, 00-2, 00-96 (June 11, 2001).

multicasting purposes. In upholding the analog must-carry rules in *Turner I* and *Turner II*, the Supreme Court did not grant broadcasters a permanent easement or other property right of 6 MHz of space on cable systems. In fact, the Court made clear that the must-carry rules were a burden on speech and expressly rejected the Government's argument that the must-carry rules were subject to no heightened First Amendment scrutiny: "This contention is unavailing. . . . [L]aws that single out the press, or certain elements thereof, for special treatment 'pose a particular danger of abuse by the State,' and so are always subject to at least some degree of heightened First Amendment scrutiny." 512 U.S. at 640-41 (citations omitted). The *Turner* Court concluded that, "[b]ecause the must-carry provisions impose special obligations upon cable operators and special burdens upon cable programmers, some measure of heightened First Amendment scrutiny is demanded." *Id.* at 641.

In *Turner II*, the Supreme Court held that the interference with cable operators' editorial discretion represented by the analog must-carry rules was permissible under intermediate First Amendment scrutiny, but only because those rules were narrowly tailored to a substantial governmental interest. As discussed in the next section, once the governmental interest – preservation of over-the-air broadcasting and diversity – is achieved through a limited must-carry obligation of a single broadcast channel, the further burden on speech represented by a broad multicasting carriage requirement becomes constitutionally impermissible.

B. A Broad View of "Primary Video" Is Not Narrowly Tailored To Any Substantial Governmental Interest.

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[3] *See id.*

A multiple carriage requirement would not be narrowly tailored to any of the governmental interests identified by the Supreme Court in *Turner I* and *Turner II*. At the outset, it is important to note that the 1992 Cable Act itself set out detailed statutory findings to justify the analog must-carry rules. *See* Cable Television Consumer Protection and Competition Act of 1992, Pub.L. 102-385, 106 Stat. 1460, §§ 2(a)(1)-(21). The Supreme Court found it significant that Congress itself had made "unusually detailed" factual findings that "are recited in the text of the Act itself." *Turner I,* 512 U.S. at 632, 646.

By contrast, the Cable Act does not contain any congressional findings with respect to digital must carry, let alone multicast digital broadcast. Similarly, there is nothing in the legislative history that would justify a carriage requirement for multiple video programming streams. Such a broad carriage requirement would not be narrowly tailored to the governmental interests identified in *Turner I* and *Turner II*: (1) "preserving the benefits of free, over-the-air local broadcast television," and (2) "promoting the widespread dissemination of information from a multiplicity of sources."[4]

(1) A multicast carriage requirement would not be narrowly tailored to the interest in preserving the benefits of free, over-the-air television. During and after the digital transition, the existing must-carry rules will continue to ensure that cable operators carry the same broadcast channels that have historically been available to over-the-air viewers. Such continued carriage – one channel per broadcaster – would seem fully to satisfy the governmental interest in preserving the benefits of free broadcast television that traditionally have been available to over-the-air viewers. The additional burden on

[4] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994); *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997).

speech represented by a multiple channel carriage requirement would be entirely gratuitous and not reasonably necessary to achieve the governmental interest in protecting broadcast television. Accordingly, absent concrete evidence otherwise, such a requirement could not satisfy the "narrow tailoring" requirement of intermediate scrutiny.

For example, in *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002), the D.C. Circuit recently relied on the efficacy of the must-carry rules in holding that the Commission's failure to repeal the cable/broadcast cross-ownership rule was arbitrary and capricious in violation of the APA. The court explained that the must-carry provisions "already ensure that broadcast stations have access to cable systems" and that a more burdensome cross-ownership ban was therefore gratuitously and needlessly broad.

(2) Nor would a multicast carriage requirement be narrowly tailored to the interest in "promoting the widespread dissemination of information from a multiplicity of sources." Affording the *same broadcaster* six cable channels rather than one does not increase the "diversity" of programming from a "multiplicity of sources." Indeed, granting preferential treatment to television broadcasters – when other programmers without such guaranteed carriage are forced to compete for audiences in the marketplace – would seem to *reduce* diversity, not increase it.

(3) The plurality in *Turner I* articulated a third governmental interest served by the analog must-carry rules: "promoting fair competition in the market for television programming." 512 U.S. at 662. But a majority of the Supreme Court in *Turner II rejected* the assertion of this interest as a basis for the analog must-carry rules. The four dissenters (Justice O'Connor, joined by Justices Scalia, Thomas, and Ginsburg) expressly found that there was not an adequate showing that "the threat of anticompetitive behavior

by cable operators supplies a content-neutral basis for sustaining the statute." 520 U.S. at 235. Justice Breyer, concurring in part, based his vote (the decisive fifth vote in *Turner II*) solely on the asserted governmental interest in protecting broadcast television. 520 U.S. at 226. He expressly did *not* join the majority opinion or analysis to the extent it relied "on an anticompetitive rationale." *Id.*

In any event, requiring carriage of broadcasters' multicast programming would not appear to be narrowly tailored to any interest in "promoting fair competition in the market for television programming." Once a broadcaster is assured that its primary programming stream will be carried, any governmental interest in "fair competition" is fully satisfied. Granting the broadcaster preferential carriage for *six* channels could not be reasonably necessary to prevent anticompetitive discrimination against the broadcaster; in fact, such a broad carriage requirement would constitute an unfair *advantage* for the broadcaster and unfair discrimination *against other programmers*.

(4) Accordingly, a requirement that cable operators carry multiple programming streams would not promote any of the governmental interests identified in *Turner Broadcasting*. Nor could a broad interpretation of "primary video" be justified by *new* rationales never considered by Congress in enacting Sections 614 and 615. First Amendment scrutiny is not mere rationality review, and the Commission is therefore not permitted to manufacture post hoc rationalizations for its must-carry rules. *See Edenfield v. Fane*, 507 U.S. 761, 768 (1993); *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480 (1989); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 785-90 (1978).

In any event, such post hoc rationalizations would be unavailing. In particular, there is no apparent reason to believe (as some have suggested) that requiring carriage of broadcasters' multicast programming will speed the transition to digital TV. On a cable system of 200 channels, it would be an unusual cable subscriber indeed who would base a decision to purchase a digital television set on whether a broadcaster is guaranteed carriage of five additional channels of standard definition digital programming. This becomes all the clearer when one realizes that the additional channels awarded to that broadcaster are likely to come at the expense of other, more often desired digital programming, or even at the expense of high-definition programming that would otherwise have been selected by the cable operator. Nor are broadcasters the only source of digital or high-definition programming; indeed, I am informed that cable programmers offer more high-definition programming than do all the broadcast networks *combined*.[5] HBO alone, for example, shows more high definition programming than do the four broadcast networks taken together. In addition, Showtime, Madison Square Garden Network, A&E, and Discovery are all producing high definition programming.[6] Thus, any hypothesized link between a multicast carriage requirement and the transition to digital television would represent precisely the sort of unsupported speculation that obviously could not satisfy intermediate First Amendment scrutiny, as to which the Supreme Court has made clear that the government's burden "is not satisfied by mere speculation and conjecture," *Edenfield v. Fane*, 507 U.S. 761, 770 (1993), or even by

[5] *See* NCTA Comments on the Further Notice of Proposed Rulemaking in CS Docket Nos. 98-120, 00-2, 00-96 (June 11, 2001).
[6] *See id*.

"anecdotal evidence and educated guesses." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995).[7]

For all these reasons, a must-carry rule for multiple video programming streams would, at the very least, raise very serious First Amendment questions.

II. A Broad Interpretation of "Primary Video" Would Raise Serious Fifth Amendment and Separation of Powers Questions As Well.

A requirement that cable operators carry multiple programming streams, pursuant to an expansive view of "primary video," would also raise serious questions under the Takings Clause of the Fifth Amendment and under the separation of powers.

A. Must Carry Rules Constitute a Taking of Property.

Must carry rules do not simply regulate the manner in which cable operators use their systems. Rather, they effectively condemn a portion of cable operators' property and *turn it over to third parties* who are entitled to exclusive use of the channels in question on a continuing basis. This system is effectively the exercise of eminent domain power over a portion of the cable system. The power to exclude others from one's property is a traditional property right. Indeed, "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property

[7] *See also Thompson v. W. States Med. Ctr*., 122 S. Ct. 1497 (2002) (holding that federal ban on advertising compounded drugs unconstitutionally restricted pharmacies' commercial speech, because government failed to demonstrate that ban was not more extensive than necessary to prevent large-scale manufacturing of unapproved drugs); *Lorillard Tobacco Co. v. Reilly*, 121 S. Ct. 2404, 2425 (2001) (invalidating restriction on speech where the government did not "'carefully calculat[e] the costs and benefits associated with the burden on speech imposed' by the regulations," even though the government adduced numerous empirical studies and extensive market data to support its judgment) (internal quotation omitted); *Bartnicki v. Vopper*, 121 S. Ct. 1753, 1764 n.18 (2001) ("mere speculation or conjecture" insufficient); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) (no "findings of fact, or indeed any evidentiary support whatsoever"); *Ibanez v. Florida Dept. of Business & Prof'l Reg.*, 512 U.S. 136, 143 (1994) ("unsupported assertions" are "insufficient" to justify restrictions on speech).

rights."[8] In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982), the Supreme Court held that even a "minor but permanent physical occupation of an owner's property authorized by government constitutes a taking of property for which just compensation is due." In that case, the taking was effectuated by a state law compelling apartment building owners to permit the attachment, in return for a nominal rent fixed by the state, of a small box occupying a mere 1½ cubic feet to the roof of their buildings. The physically small magnitude of the taking did not alter the principle involved or deter the Court from enforcing the applicable Fifth Amendment command.

In *Bell Atlantic Corp. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1996), the D.C. Circuit invalidated the Commission's physical co-location rules, which granted competitive access providers "the right to exclusive use of a portion of the [local exchange carriers'] central offices." According to the court, the Commission's decision "directly implicate[d] the Just Compensation Clause of the Fifth Amendment, under which a 'permanent physical occupation authorized by government is a taking without regard to the public interest that it may serve.'" 24 F.3d at 1445 (quoting *Loretto v. Teleprompter Manhattan CATV*, 458 U.S. at 426).[9] That agency decision was therefore impermissible absent clear congressional authorization, which the D.C. Circuit found to be lacking.

Giving broadcasters exclusive use of multiple cable channels on a continuing basis is at least as clearly a taking as is granting cable operators the more visible but far

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[8] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). *See also Nollan v. California Coastal Comm'n*, 483 U.S. 825, 830-32 (1987); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979).

[9] The D.C. Circuit also remanded the Commission's "virtual co-location" rule, under which a competitive access provider could string its own cable to a point of interconnection close to the LEC central office.

less economically valuable right to attach their wires to a small corner of a building's roof or requiring local exchange carriers to permit physical co-location on their premises. Hence, in *Turner Broadcasting I*, four Justices recognized that a common carriage obligation for "some" of a cable system's channels would raise substantial Takings Clause questions. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 684 (1994) (O'Connor, J., joined by Scalia, Thomas, and Ginsburg, JJ., concurring in part and dissenting in part). A requirement that cable operators carry multiple programming streams, under an expansive view of "primary video," would raise a constitutional question that is at least as serious as that identified by four members of the Court in *Turner Broadcasting.*

Cable operators have made reported investments of over $60 billion in order to upgrade their systems to transmit digital signals more efficiently. It is these investments, made to better serve cable customers, that have created the opportunity for a broadcast channel's signal to be carried in a single MHz of spectrum rather than in 6 MHz. For the government to take advantage of cable operators' own improvements to their property to commandeer an additional five channels per broadcaster would upset reasonable investment-backed expectations and violate basic norms of fairness. It would be as though a farmer, after increasing his crop yield six-fold through hard work and investments in increased productivity, were faced with a government decree confiscating five-sixths of his crop production on the ground that, in light of global needs, it was "surplus."

There would be no question that a compensable taking of private property for public use had occurred if the government decreed that cable operators had to turn over

their entire channel capacity to broadcasters, even if the cable operators retained title to and bare possession of the tangible real and personal property necessary to provide programming to the system's subscribers over those channels.[10] "[W]hen the Government has condemned business property with the intention of carrying on the business, as where public-utility property has been taken over for continued operation by a governmental authority[, and] the taker acquires going-concern value, it must pay for it." *Kimball Laundry v. United States*, 338 U.S. 1, 12 (1949); *see also Los Angeles Gas & Elec. Corp. v. Railroad Comm'n*, 289 U.S. 287, 313 (1933). The constitutional principle is exactly the same whether the transfer is accomplished wholesale or piece by piece. There is no constitutional exception that allows the government to avoid the Takings Clause by taking one strand of property at a time.[11]

B. Congress Has Enacted No Guarantee of Just Compensation for This Taking.

To pass muster under the Fifth Amendment, a taking of private property for public use must be accompanied by "just compensation." "[T]here must be at the time of taking 'reasonable, certain and adequate provision for obtaining compensation.'"[12] If it is to be constitutionally adequate, that compensation must represent "the full and perfect equivalent in money of the property taken. The owner is to be put in as good [a] position pecuniarily as he would have occupied if his property had not been taken."[13]

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[10] For example, the "seizure" of the steel mills in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), was no less a taking even though it did not involve *any* physical invasion as such of the mills by government agents. Rather, the presidents of the various mills were deputized as "operations managers" and directed to carry on their activities in accordance with regulations and directions of the Secretary of Commerce. *Id.* at 583.

[11] *See e.g., Hodel v. Irving*, 481 U.S. 704, 716 (1987); *Babbitt v. Youpee*, 519 U.S. 234, 245 (1997).

[12] *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-125, (1974) (quoting *Cherokee Nation v. Southern Kansas R. Co.,* 135 U.S. 641, 659 (1890)).

[13] *United Sates v. Miller*, 317 U.S. 369, 373 (1943).

But there is no statutory mechanism in the Communications Act that guarantees adequate compensation from any source for the forced carriage of multiple streams of video programming. In fact, Section 614(b)(10) of the Act flatly *prohibits* cable operators from receiving compensation from broadcasters. *See* 47 U.S.C. §534(b)(10). Nor is there any congressional authorization for compensation from the federal Treasury.

It is no answer to suggest that a remedy under the Tucker Act, 28 U.S.C. § 1491(a)(1), might provide just compensation. In fact, such a suggestion would merely underscore the separation of powers problem posed by a broad interpretation of "primary video" that would compel cable operators to carry multiple programming streams. The Constitution vests *Congress* with the exclusive powers of raising revenue and appropriating money from the Treasury. Art. I, §8, cl. 1; Art. I, §9, cl. 7. Accordingly, federal executive or administrative action that effects a taking, and thereby triggers the obligation to pay Just Compensation under the Fifth Amendment, is unlawful unless there is clear congressional authorization in advance for the action. "When there is no authorization by an act of Congress or the Constitution for the Executive to take private property, an effective taking by the Executive is unlawful because it usurps Congress's constitutionally granted powers of lawmaking and appropriation." *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1510 (D.C. Cir. 1984) (*en banc*), *vacated on other grounds*, 471 U.S. 1113 (1985); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586 (1952); *id.* 598 (Frankfurter, J., concurring); *id.* at 631-32 (Douglas, J., concurring); *id.* at 656-60 (Burton, J., concurring); *id.* at 662-65 (Clark, J., concurring in the judgment).

"Where administrative interpretation of a statute" effects a taking, "use of a narrowing construction prevents executive encroachment on Congress's exclusive powers to raise revenue and to appropriate funds." *Bell Atlantic*, 24 F.3d at 1445. The Supreme Court has long held that statutes shall not be read to delegate the congressional power to take property unless they do so "in express terms or by necessary implication." *Western Union Telegraph Co. v. Pennsylvania R.R.*, 195 U.S. 540, 569 (1904); *see also Regional Rail Reorganization Act Cases*, 419 U.S. at 127 n.16. That principle implements the general rule that statutes are to be construed where possible to avoid constitutional questions. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988); *see also United States v. Security Indus. Bank*, 459 U.S. 70, 78, 82 (1982) (adopting narrowing construction of statute to avert a takings question); *NCTA v. FCC*, 415 U.S. 336, 342 (1974) (holding that the relevant federal statute should be read "narrowly to avoid constitutional problems" – namely, a delegation of the taxing power – raised by a system of fees imposed by the FCC on community antenna television stations); *TCI of North Dakota v. Schriock Holding Co.,* 11 F.3d 812, 815 (8th Cir. 1993) (rejecting interpretation of Cable Act that would raise taking issue).

The deference to administrative action ordinarily afforded under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is entirely inapplicable where administrative action raises Fifth Amendment questions. *See Bell Atlantic*, 24 F.3d at 1445; *see also United States v. Mead Corp.*, 121 S. Ct. 2164, 2171 (2001) (holding that *Chevron* applies only when "Congress [has] delegated authority to the agency generally to make rules carrying the force of law," and that *Chevron* did not extend to tariff classification ruling). Hence, the Commission's conclusion that the

statutory language does not itself *compel* a broad view of "primary video" is determinative. For if the statute is concededly ambiguous, and if it does not expressly require the FCC to order cable operators to carry multicast streams of broadcasters' video programming, then the requisite clear statement is absent. The Commission must construe the statute in a manner that avoids several serious constitutional problems by interpreting "primary video" narrowly.

CONCLUSION

The Commission should avoid a broad interpretation of the "primary video" carriage obligation because of the substantial First Amendment, Fifth Amendment, and separation of powers questions that a broad interpretation would raise.